IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 99 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE M.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SHASHIKANT FAKIRBHAI

Versus

NAVNITLAL GOPALDAS

Appearance:

MR ARUN H MEHTA for Appellants No. 1-2

MR BHARAT J SHELAT for Respondents No. 1-2

CORAM : MR.JUSTICE M.C.PATEL

Date of decision: 27/02/2003

ORAL JUDGEMENT

1. This appeal, by the original plaintiffs, is directed against the judgment, order and decree dated 11th April, 1983 passed by the learned Additional

Principal Judge, City Civil Court in Civil Suit No.3759 of 1978.

2. The plaintiffs and the defendants were partners trading in the name and style of Shashikant Gopaldas & Co. The partnership firm owned a factory building with an open land. When the partnership was dissolved, the said property was partitioned in two divisions, the front portion of which fell to the share of the plaintiffs and the rear portion fell to the share of the defendants. There was a stipulation in the partnership deed that the defendants will have a right of way over a part falling to the share of the plaintiffs, till a particular eventuality took place. According to the plaintiffs, this was a temporary arrangement and the defendants were duty-bound to make their own permanent arrangement about their exit, that the defendants did open an exit in the rear portion and as a result, by virtue of the agreement contained in the partition deed, the defendants were bound to construct a masonary wall dividing the two portions but the defendants did not do so and the gate which they had opened in the rear portion had been closed by them. The plaintiffs contended that because the defendants had put up a gate of exit in the rear portion, the right of way over the portion falling to the share of the plaintiffs had come to an end. They, therefore, filed the suit to restrain the defendants from claiming or otherwise, using such right of way and for requiring masonary wall to be constructed separating the two portions.

3. The defendants filed their written statement and resisted the suit. They contended that they did open the gate in the rear portion but it had to be closed at the instance of the Municipal Corporation and that they had not been able to obtain independent passage to the property falling to their share and, in the circumstances, the eastern part of the strip of land which had fallen to the plaintiffs' share, as stipulated in the partition deed, was their only right of way which should continue.

4. The learned Judge framed the following three main issues arising from the pleadings of the parties:

(1) Whether the plaintiffs prove that defendants got a separate, independent passage of access to 2441 sq. yards of land (which 2441 sq. yards of land fell to defendants' share in partition of final plot no.144 between the plaintiffs

on one side and defendants on the other) and that as a result, by virtue of the stipulation in the partition deed, the defendants are no longer entitled to any right of passage over the 20 feet wide and 222'.6" long strip of land in the east of the sub-plot falling to the plaintiff's share.

(2) Whether plaintiffs are entitled to construct a wall dividing the two parts of the plot and blocking the aforesaid passage provided in the partition deed of final plot no.144, and that the defendants unlawfully interfere in exercise of plaintiffs' said right?

(3) Whether plaintiffs are entitled to the injunction sought?

5. At the end of the trial, the learned Judge recorded his findings as follows:

(1) In the negative all throughout.

(2) In the negative; except that plaintiffs have a right to construct a wall dividing two parts of the plot, but in such manner as that the wall should not block aforesaid passage in any manner.

(3) In the affirmative, so far as the construction of the wall dividing the two portions is concerned, ably to the extent that it will in no way block defendants' passage provided in the partition deed.

6. In view of the said findings, the learned Judge granted an injunction to restrain the defendants from interfering with the plaintiffs' right to put up a wall in the boundary dividing the portions partitioned by partition deed dated 28th April, 1966 but the rest of the suit was dismissed.

7. The plaintiffs have, therefore, filed this appeal challenging the said judgment and decree to the extent that their suit was dismissed.

8. The partition deed was produced at Exh.25. There was a condition in the deed providing right of passage to

the defendants over the eastern strip of plaintiffs' portion till a passage could be had from the Municipality or the Government for the rear portion falling to the share of the defendants. The learned Judge, after considering the other documentary evidence on record, found that when the defendants opened a gate in the rear portion of their land, the Corporation issued a show-cause notice to them since it was opened without any permission having been obtained from the Corporation and because it was opened in the final plot no.145 belonging to the Corporation. In view of this, the learned Judge held that since the defendants could not obtain any other passage for going out of their portion in final plot no.145, the right of passage over the plaintiffs' portion granted in the partition deed continued.

9. The learned counsel for the appellants took me through the judgment and the evidence on record but he could not show that the conclusion reached by the learned Judge is, in any way, erroneous. There is, therefore, no substance in the appeal and the same is dismissed. No order as to costs.

(M.C. Patel, J.)

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